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In The

Supreme Court of the United States

October Term, 1983

THE AMERICAN BEARING CO., INC.,

Petitioner,

vs.

LITTON INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C. GARY WYNKOOP
Four Penn Center Plaza
Philadelphia, Pennsylvania 19103
(215) 569-5612

SAMUEL R. SIMON
1845 Walnut Street
Philadelphia, Pennsylvania 19103
(215) 963-0600

Attorneys for Petitioner

0611
Lits Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

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QUESTION PRESENTED

Whether a court of appeals, consistent with the Seventh Amendment, may hold that the grant of a new trial was properly based upon its own conclusion that a plaintiff's jury verdict returned on special interrogatories in an antitrust case, although founded on concededly substantial evidence presented by multiple witnesses, was nonetheless "against the weight of the evidence" because of its own view that the evidence upon which it was based was "unpersuasive" and "limited."

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OPINIONS BELOW

The opinion of the court of appeals is reported at 729 F. 2d 943, and is set out in the Appendix hereto at 1a-23a.

The opinion of the district court is reported at 540 F. Supp. 1163, and is set out in the Appendix hereto at 24a-48a.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1984. The order of the court of appeals denying rehearing and rehearing *en banc* was entered on April 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides in pertinent part:

> "In Suits at common law . . . no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Section 2 of the Sherman Act, 15 U.S.C. §2, provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony . . . ."

Section 4(a) of the Clayton Act, 15 U.S.C. §15(a), provides in pertinent part:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorneys fee."

STATEMENT OF THE CASE

A. Background

High-temperature electrostatic precipitators and fabric filters are types of industrial air pollution control equipment used to remove ash and soot from the exhaust gases produced by coal-fired boilers. Although precipitators and fabric filters vary in size depending on the flow of hot boiler gas passing through them, they are typically large steel structures that may measure 100 feet wide, 60 to 80 feet deep, and 100 feet high. Precipitators create an electrical field that collects the ash in the gas stream. Fabric filters collect ash by passing boiler gas through a multitude of interior bags, and are often called "baghouses."

The flow of hot boiler gas through a precipitator or baghouse causes thermal expansion of the unit's structural steel. A temperature change of 400° F causes a 50-foot structural member such as a column or beam to move approximately 1½ inches. Thermal expansion in a large unit may cause a structural member to move as much as three inches. Slide bearings positioned at the unit's structural support points permit the steel members to move freely when they expand.

The ease with which an expanding vertical column moves across the surface of a slide bearing, in proportion to the force it exerts on the bearing, is expressed as a ratio between the horizontal force needed to initiate or maintain free lateral movement and the vertical force that the column exerts on the bearing. The force exerted by the column is a function of the column's weight and the weight of the portion of the structure it is supporting. The ratio between the horizontal force and the vertical force is called the coefficient of friction. The less horizontal force is required to initiate or maintain lateral movement, the lower will be the coefficient of friction.

The size of columns and their dependent structural members is proportional to the coefficient of friction of the bearings across which the columns move. Installation of bearings with a low coefficient of friction permits use of smaller columns and beams, which substantially reduces the cost of the entire structure.

Slide bearings installed in precipitators and baghouses must be able to permit free movement of the heavy structural members under which they are positioned, which typically exert a force of some 3000 pounds per square inch ("psi") on the bearings' surface. A slide bearing that does not operate properly may cause extensive structural damage. A steel column that is not free to move when exposed to temperature changes will become distorted in shape, which will in turn cause deformation of its dependent structural members. Bearing failure in a precipitator or baghouse may cause the unit's walls to rupture, and may cause such severe misalignment that the unit will be unable to function.

An inoperative pollution control unit requires that the boiler be taken off-line to halt the discharge of ash-laden gas into the air. After the unit cools down it must be lifted with a hydraulic jack, and the fractured steel and the bearing must be replaced. In a utility station the failure of a single bearing costing $100 to $130 can cause damage, including lost electric power production, on the order of $100,000 a day. Under these circumstances no prudent engineer would recommend purchase of a bearing that a reliable source had informed him could not function.

Petitioner The American Bearing Co., Inc. is a small manufacturer of bearings located in Fairfield, New Jersey that was formed in October 1969 by Ronald L. Roman and Robert A. Furchak. It manufactures a variety of bearings used in heavy construction applications, such as bridges, highways, structures, and pollution control equipment. Bearings are engineered items which are specified and fabricated on a job-by-job basis.

Boiler gas is carried in ductwork to and from the inlet and outlet flanges of a precipitator or baghouse. Petitioner had been selling a style of bearing called "Tetra-Slide" for ductwork support applications in the air pollution control industry. That industry is a concentrated one, consisting of about 15 or 20 design engineering companies that manufacture precipitators, baghouses, and their related light-weight ductwork. With exposure to the industry, petitioner discovered that the Merriman Division of Litton Industrial Products, Inc., a wholly-owned subsidiary of respondent Litton Industries, was the sole supplier of high-temperature precipitator and baghouse structural support bearings to the pollution control industry. Typical industry specifications for such bearings called for a coefficient of friction of 3% or less while under pressure of 3000 psi and temperature of 400° F, specifications that petitioner's Tetra-Slide bearing could not meet.

Respondent held a patent on a structural support bearing which it sold under the name "Lubrite-F." That bearing consisted of woven Teflon fiber affixed to a steel plate. Petitioner saw the high-temperature structural bearing market as a source of potential profit, and determined to penetrate it with a bearing that would meet the industry specifications but would not infringe respondent's patent. Through experimentation petitioner developed a fully competitive bearing consisting of a sheet of glass-reinforced Teflon resin that was mechanically locked onto a steel plate. Petitioner called the new product its "Hi-Load" bearing. The Hi-Load bearing met the industry design criteria, was 40% less expensive than respondent's Lubrite-F bearing, and could be delivered faster. Mr. Furchak was eventually granted a patent on his invention, which embodies the concept of mechanical locking (*i.e.*, non-adhesive binding) of the sheet Teflon onto the steel backing-plate.

Petitioner began to concentrate its selling efforts on its Hi-Load bearing for high-temperature precipitator and baghouse structural support applications. To illustrate its new concept in bearing design, petitioner distributed miniature sales samples, measuring 2 inches by 2 inches, to engineers and purchasing agents in the pollution control industry. These miniature samples were fabricated without quality control procedures, were far too small to be bearings, and could not have been mistaken by anyone for actual, working bearings.

Respondent became aware of petitioner's attempt to enter the market. It obtained one of petitioner's sales aids and cut it in half with a saw. On March 25-26, 1976, before petitioner had sold its first Hi-Load bearing, respondent conducted an overnight test of the dismembered sales sample. Respondent's engineering supervisor drafted a one-page test report on March 26, 1976 that stated that petitioner's bearing could not function under pressure of 3000 psi and temperature of 400° F. On the same day the test report was written, respondent's sales manager sent a copy of it to Carborundum Co., a manufacturer of pollution control equipment that was considering purchasing petitioner's bearings.

Respondent omitted to state in its test report that the object it had tested was not a bearing. The test report did not state that respondent had cut the sales aid in half with a saw. It did not state that the coefficient of friction was so low that it could not be measured. It did state that the "bearing" was subject to rapid wear, but neglected to state that respondent had conducted no wear measurements during the test. It stated, instead, that respondent had tested a bearing manufactured by petitioner and that the bearing could not function.

Over the next four years respondent employed this test report to exclude petitioner from the market for structural bearings used in high-temperature pollution control equipment. Respondent

furnished copies of the report to its salesmen, and placed no restrictions on its distribution to bearing purchasers. Respondent disseminated the report widely to purchasing agents and engineers at pollution equipment manufacturing companies, including companies which made up over 50 percent of the high-temperature precipitator market in 1977. There is no way of knowing the additional number of times the test report was distributed or the identities of all the bearing purchasers who received it.

Respondent's exclusionary conduct had a devastating effect on petitioner's ability to penetrate the market. After an initial enthusiastic reception as purchasing agents and engineers welcomed a less expensive second seller into a previously monopolistic market, petitioner found that bearing customers abruptly refused to purchase its bearings or even to solicit bids from it. Customers rejected petitioner's low bids after respondent informed them of its test results. Despite unremitting sales efforts to promote a fully competitive product, petitioner found itself virtually shut out of the market.

B. Proceedings Below

Petitioner filed this lawsuit on June 15, 1978, charging respondent with monopolization and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. §2, and asserting pendent claims of trade libel and tortious interference with contractual relations. Federal jurisdiction was conferred on the district court by virtue of 28 U.S.C. §1337. Petitioner dropped its claim of tortious interference during trial to reduce the complexity of the jury charge.

1. The Trial

Trial lasted three weeks, from May 19 to June 9, 1981. Petitioner presented the testimony of its founders Mr. Roman

and Mr. Furchak, with Mr. Furchak defining the relevant product market in this litigation and Mr. Roman testifying that respondent's conduct had caused his company to lose sales. Petitioner also presented four expert witnesses to the jury. J. Albert Hudson of Knoxville, a former chief engineer at the Tennessee Valley Authority, explained how precipitators and baghouses work, and testified that as an experienced pollution-control engineer he would not specify a bearing that a reliable source had told him would fail. Professor Frederic Roll, of the Department of Civil Engineering at the University of Pennsylvania, explained relevant engineering concepts to the jury. He testified that respondent's test of March 25-26, 1976 was inaccurate and not in conformity with good engineering practice, that its conclusions were unwarranted by the test data, and that tests he conducted and test results he had studied demonstrated that petitioner's bearings functioned satisfactorily under elevated pressure and temperature. Robert W. McIlvaine, president of The McIlvaine Co. in Northbrook, Illinois, testified to national sales statistics for high-temperature precipitators and baghouses. Dr. Gary W. Bowman, an Associate Professor of Economics at Temple University, presented economic testimony to the jury. Dr. Bowman defined the relevant product and geographic market, and testified that respondent's conduct was a material cause of petitioner's foreclosure from that market. To estimate the amount of damages petitioner suffered during the 1976-1983 damage period as a result of respondent's conduct, Dr. Bowman quantified the size of the relevant market using the most accurate statistics available, and calculated that respondent had approximately 95% of the relevant market during the 1976-1978 time period.

Petitioner presented the testimony of respondent's sales manager through deposition and read to the jury respondent's interrogatory answers admitting dissemination of the test report throughout the pollution control industry. Petitioner presented the deposition testimony of three allegedly competing bearing

manufacturers establishing that none of them was in the market, and the deposition testimony of two bearing purchasers concerning which companies were in the market. In all, five witnesses testified that respondent was the sole company in the relevant market when petitioner attempted to enter in early 1976.

Respondent called no experts in its defense. Its witnesses consisted of the laboratory technician who had conducted the test in March 1976, its engineering supervisor, an engineer formerly employed at a major manufacturer of pollution control equipment, and its vice president and general manager. Respondent recalled Mr. Roman and Mr. Furchak to the stand, and read the depositions of three bearing purchasers to the jury. Respondent called its sales manager to the stand, but in the jury's presence removed him before his testimony began and did not recall him. Respondent also refrained from calling an M.I.T. professor whom it had engaged to conduct tests of petitioner's bearings. In contrast to petitioner, who presented the testimony of two witnesses defining the relevant market, respondent presented no testimony by anyone defining the relevant market.

2. The Jury's Verdict and Judgment of the District Court

The jury returned its verdict on June 9, 1981. It found that petitioner had not proved its charge of trade libel (Jury Interrogatory No. 1), but that respondent had monopolized and attempted to monopolize the relevant market in violation of Section 2 of the Sherman Act, and that its unlawful conduct was a proximate cause of injury to petitioner (Jury Interrogatories No. 2A-3C). The jury awarded petitioner $958,691 in damages (Jury Interrogatory No. 4). The Jury Interrogatories are reproduced in the Appendix hereto at 53a-56a. Pursuant to Section 4(a) of the Clayton Act, 15 U.S.C. §15(a), the district court entered judgment in favor of petitioner in the amount of $2,876,073 on June 10, 1981.

3. The District Court's Ruling on Post-Trial Motions

On May 27, 1982, the district court denied respondent's motion for judgment n.o.v., but granted its motion for a new trial on petitioner's antitrust claims under Rule 50, Fed. R. Civ. P. *American Bearing Co., Inc. v. Litton Industries, Inc.*, 540 F. Supp. 1163 (E.D. Pa. 1982) (24a-48a). The district court held that Dr. Bowman's calculation of the size of the relevant market — a calculation that had been introduced into evidence solely to permit computation of the amount of damages suffered by petitioner — had been based on "speculation" and "unsupported assumptions." Relying on a subsequently expressly overruled portion of a district court decision,[1] the court held that Dr. Bowman's testimony on market size should have been excluded at trial under Rules 703 and 403 of the Federal Rules of Evidence. Although the jury had affirmatively answered separate interrogatories relating to liability and proximate causation, the district court nonetheless ruled that its post-trial exclusion of petitioner's evidence on the *amount* of damages it suffered required the granting of a new trial on respondent's *liability* as well. On August 11, 1982 the district court denied petitioner's motion for reconsideration without opinion.

4. The Retrial

Retrial of the case began on February 28, 1983, with petitioner presenting substantially the same case-in-chief as in the first trial. As in the first trial, petitioner called Dr. Bowman as its economic expert. During the course of direct examination, the trial judge ruled that Dr. Bowman's opinion testimony would be limited to

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1. *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 505 F. Supp. 1313, 1330 (E.D. Pa. 1980), *expressly overruled* in *In re Japanese Electronic Products*, 723 F. 2d 238, 275-78 (3d Cir. 1983).

conclusions based on factual evidence presented during the retrial. The court ruled that Dr. Bowman would not be permitted to rely on information given to him prior to trial by other sources, including experts such as Mr. Hudson, or even on the testimony those experts had given during the first trial. The court then denied petitioner's request to recall Mr. Hudson as a witness to place facts in evidence upon which Dr. Bowman could base his testimony.

Faced with the district court's rulings (1) limiting Dr. Bowman to opinion testimony based on evidence actually introduced during the retrial, and (2) denying petitioner the opportunity to supply that evidence by recalling an available witness to the stand, petitioner presented an offer of proof of Dr. Bowman's testimony, withdrew the witness, moved its exhibits into evidence, and rested without proving a *prima facie* case. The district court thereupon granted petitioner's motion for a directed verdict.

5. The Decision of the Court of Appeals

A panel of the Court of Appeals for the Third Circuit affirmed the judgment of the district court on March 16, 1984. *American Bearing Co. v. Litton Industries, Inc.*, 729 F. 2d 943 (3d Cir. 1984) (1a-23a). The court of appeals, in an opinion by Senior Circuit Judge Van Dusen, assumed that both Mr. Furchak's and Dr. Bowman's testimony defining the relevant market had been properly admitted into evidence. 729 F.2d at 950 n. 14 (14a-16a at n. 14). The court of appeals, however, independently purported to canvass the evidence that had been presented at trial relating to both antitrust liability and proximate causation.

On liability, the court of appeals failed to recognize that respondent had presented no evidence whatsoever defining the relevant market. Although it acknowledged that petitioner had presented the testimony of *two* witnesses defining the relevant

market, it nonetheless concluded that the evidence presented by petitioner defining the relevant product market was "unpersuasive," 729 F.2d at 949 (14a), that inferences that could have been drawn from other evidence in the record "suggest[ed] . . . a far broader market" than the market that petitioner's witnesses had defined, *id.* at 949 (17a), that petitioner "failed to establish a relevant product market," *id.* at 953 n. 17 (23a n. 17), and that the jury's verdict on liability predicated on petitioner's definition of relevant market was "on this record . . . against the weight of the evidence." *Id.* at 951-52 (19a-20a).

On proximate causation, the court of appeals likewise purported to survey the evidence of record. *Id.* at 952-53 (20a-23a). Ignoring the most powerful evidence that petitioner had presented, the court of appeals concluded that petitioner's evidence on causation was "limited," *id* at 953 (22a), and that the jury's decision that respondent's activities were a proximate cause of petitioner's damages was "against the weight of the evidence." *Id.* at 953 (23a).

The court of appeals denied American's petition for rehearing on April 16, 1984 (51a-52a).

REASONS FOR GRANTING THE WRIT

This Court has held that the Seventh Amendment forbids appellate reconsideration of facts found by a jury. As the Court has held, "neither we nor the Court of Appeals can redetermine facts found by the jury . . . ." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962). Indeed, the Court has recently reminded us that the Seventh Amendment constitutes a "ban on re-examination of facts tried by a jury," and creates a "stringent . . . limitation of appellate review of factual determinations . . . ." *Bose Corp. v. Consumers Union of United States, Inc.*, No. 82-1246 (April 30, 1984), 104 S. Ct. 1949, 1964 n. 27.

The decision of the court of appeals cannot be reconciled with the Seventh Amendment. The conclusion of the court of appeals that petitioner's evidence on market definition was "unpersuasive" was a conclusion it should not have attempted to draw as a matter of law, and was in fact based on its misunderstanding of all of the evidence it purported to examine on market definition. The conclusion of the court of appeals that petitioner's evidence on proximate cause was "limited" — a conclusion it should not have attempted to draw as a matter of law — was based on its simply ignoring all of petitioner's most powerful evidence on the point. On both liability and proximate causation the court of appeals substituted its own view as to the weight of the evidence for that of the jury.

The decision of the court below has devastating implications for any private plaintiff prosecuting a market-foreclosure antitrust case. On liability, a plaintiff in a Section 2 antitrust case must define a relevant market. In this case, petitioner defined the relevant market through the testimony of both its co-owner and its expert economist. Although respondent presented no testimony whatsoever on market definition, the court of appeals made a

factual finding that petitioner's testimony, which had been accepted by the jury as credible and valid, was nonetheless "unpersuasive." 729 F. 2d at 949 (14a). The new standard enunciated by the court below requires that the court of appeals itself be "persuaded" as a factual matter that the relevant market is what the jury found it to be, even in a case where, as here, the jury's verdict is supported by the testimony of both a fact witness and an expert witness. The proper role of the court of appeals would have been to confine itself to an examination of the evidence introduced at trial in order to determine whether the jury's verdict was based upon sufficient admissible evidence. In straying beyond this role and substituting its own assessment of the weight of the admissible evidence for that of the jury, the court of appeals has committed error of constitutional dimension.

Similarly, on the question of proximate causation, petitioner presented the testimony of its president and of two expert witnesses that respondent's conduct was a material cause of its foreclosure from the market. The court of appeals made a *factual finding* that this testimony, which had been accepted by the jury as credible and valid, was too "limited" to support the jury's verdict. Under this new standard — a standard that permits a court of appeals to reject a jury verdict founded on the testimony of *three* witnesses because, in the view of the court of appeals, that testimony was too "limited" — it is likely that no antitrust plaintiff can ever present sufficient evidence of proximate causation to retain a jury verdict in its favor.

I. Relevant Market

The court of appeals acknowledged in its opinion that two of petitioner's witnesses — one of its owners and its expert economist — did explicitly and precisely define the relevant market at trial. As the court of appeals stated:

> "Dr. Gary W. Bowman, an Associate Professor of Economics at Temple University . . . defined product and geographic markets . . . . Dr. Bowman defined 'thermal' bearings as bearings which operate with a 3% coefficient of friction while exposed to temperature of 400° F. and pressure of 3000 p.s.i. (1263a, 1335a). He gave his opinion that a separate market exists for thermal bearings for use in the support structures of baghouses and precipitators and opined that the market was nationwide." 729 F. 2d at 946 (7a-8a).

* * *

> "[O]ne of the company's owners testified as to the relevant product market. The owner, Mr. Furchak, testified that the manufacturers of high-temperature pollution control equipment require bearings that will function at a coefficient of friction of 3% or less while exposed to temperature of 400° F and pressure of 3000 p.s.i. (250a-251a).
>
> Moreover, Dr. Bowman, the expert who [also] defined the relevant product and geographic markets, testified on direct examination: '. . . Thermal bearings are bearings which are slide bearings which operate at about 400 degrees Fahrenheit, 3000 pounds per square inch and 3 percent coefficient of friction.' (1262a-1264a, 1335a)." 729 F. 2d at 949-50 n. 14 (14a-15a n. 14).

Dr. Bowman explained that there were no "substitutes or alternatives" for thermal bearings. Other bearings "could not do the same basic job. Since they could not do the same basic job, they are not a part of the market per se. In fact, that means that

makes thermal bearings a market as an economist talks about it." Dr. Bowman thus "employed the correct test for determining whether [thermal bearings] constitute a separate market — whether there are other products that are reasonably substitutable [therefor]." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, No. 83-271 (S. Ct., June 27, 1984), 51 U.S.L.W. 4928, 4935.

Once petitioner presented the testimony of two witnesses defining the relevant market, the question of market definition in this case became a jury issue. Respondent, by contrast, presented no evidence whatsoever defining the relevant market. Like respondent, the court of appeals did not attempt to define a relevant market: rather, it simply stated that it was not "persuaded" that petitioner's market definition was correct. Under these circumstances, where plaintiff's market definition is supported by the testimony of *two* highly qualified witnesses, where defendant introduces no evidence at all in contradiction, and the court of appeals holds that plaintiff's evidence of market definition was properly admitted, the action of the court of appeals in substituting its own assessment of the weight of the evidence for that of the jury because *it* found the evidence "unpersuasive" cannot be reconciled with the Seventh Amendment.[2]

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2. This is particularly true in this case, where the issue on which the evidence was presented was market definition. Until this decision, the law within the Third Circuit, as elsewhere, was that market definition in an antitrust case is a question of fact for the jury. *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F. 2d 20, 28 (3d Cir. 1978). *See Jennings Oil Co. v. Mobil Oil Corp.*, 539 F. Supp. 1349, 1352 (S.D.N.Y. 1982); *Sulmeyer v. Seven-Up Corp.*, 411 F. Supp. 635, 643 (S.D.N.Y. 1976); *Sulmeyer v. Coca Cola Co.*, 515 F. 2d 835, 848 (5th Cir. 1975).

II. Proximate Causation

This Court has defined the quantum of proof necessary to submit to a jury the issue of proximate causation in a market-foreclosure antitrust case. The Court has held that "[t]rial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-67 (1981). The question of proximate causation was properly a jury issue in this case, and the jury found that respondent's unlawful conduct was — as three of petitioner's witnesses had testified — a proximate cause of petitioner's foreclosure from its proper share of the market. The only way the court of appeals could conclude that petitioner's evidence on the point was too "limited" to support the jury's verdict was simply to ignore the most telling evidence petitioner presented on the issue.

Thus, the court of appeals' discussion of proximate causation failed to acknowledge the most powerful evidence that petitioner presented to the jury on the issue, which was Dr. Bowman's opinion testimony that respondent's actions had excluded petitioner from the market.[3] As the district court acknowledged

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3. Rule 704 of the Federal Rules of Evidence states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." As permitted by Rule 704, "expressions of expert opinion on the ultimate facts in issue . . . do not . . . invade the province of the jury. Such expressions, if they will assist the trier of fact, are admissible." *In re Japanese Electronic Products Antitrust*

(Cont'd)

in its post-trial opinion, Dr. Bowman testified repeatedly and with extreme clarity that petitioner did not sell nearly as well in the relevant market as it would have done if respondent had not disseminated its test report throughout the pollution control industry.[4] Thus, Dr. Bowman testified on direct examination:

> "Q. Do you have an opinion as to why American did not enter the market and get 12½ percent the first year and 37 percent the second year, and 50 percent the third year, as you predicted that it might?
>
> A. Yes, I do.
>
> Q. And what is that opinion?
>
> A. My opinion is that the reason they didn't get the market share that they would have had under fair competition is the Litton letter saying falsely that in fact their product doesn't work.

(Cont'd)

Litigation, 723 F. 2d 238, 278 (3d Cir. 1983). Under Rule 704 an expert economist is of course permitted to testify to an ultimate issue within his sphere of expertise — here, "fact of damage" by foreclosure from a market.

Rule 702 of the Federal Rules of Evidence permits an expert witness to present opinion or factual testimony on matters within the scope of his expertise. The district court found Dr. Bowman "well qualified as an economist." 540 F. Supp. at 1172 (41a). Dr. Bowman was certainly qualified under Rule 702 to present his opinion on the ultimate issue of market exclusion.

4. The district court stated: "The economist also testified that American Bearing's failure to achieve the projected market shares was attributable solely to Litton's circulation of a false test report." 540 F. Supp. at 1167 (29a).

Q. Did you consider whether or not there were any other factors in this market that might have caused or contributed to American's failure to acquire market share as rapidly as you predict?

A. Oh, yes, I considered that and looked at the market, carefully, and there aren't those other factors, as I described earlier."

On cross-examination Dr. Bowman elaborated on his testimony on proximate causation:

"Q. Wait a moment. Let me ask you this: The 12.5 percent, do you mean that American didn't actually make that many sales?

A. Oh, no. They certainly didn't. You see, that is what they would have gotten had there been fair competition. There wasn't fair competition. They got substantially less sales than that. That's sort of the whole point.

Q. And sir, as I understand, you are basing that — if I understand your prior testimony — that you are basing that upon your contention that they didn't get those because of the circulation of the Merriman test report; is that correct?

A. That's correct, the false statements —

Q. And that is the sole reason.

A. Well, and the accompanying statements that were made by Litton about American's products . . . ."

* * *

"I have a basis for saying, a clear basis: a long study that demonstrates that American didn't get its fair market share.

When you do a study like this, when an economist does a study, the intent is to look at the overall market and be able to assess where American would have been had there been fair competition.

The study doesn't look specifically at, say, company A; company A would have bought on December 23 this number of bearings from American under fair competition. That's not the kind of thing you can do.

You look broadly at the market, and you see a new competitor with a lower price and a better product, and economic practice, economic theory, everything points to the fact that would be a competitor that would have gotten a substantial market share. . . ."

* * *

"I didn't say that they didn't make any sales at all. As a matter of fact, I explained earlier that they sold about five percent of the market in the early year, that is to say, early in — what — through the year 1976.

What I was explaining was that they weren't getting the share of the market that they would have if it hadn't been for the letter that falsely said that their bearings weren't any good."

Dr. Bowman's testimony is not mentioned in the opinion of the court of appeals. Instead, the court below simply ignored Dr. Bowman's testimony as though it were not there, and concluded that the jury's affirmative answers to the special interrogatories submitted to it on proximate causation were "against the weight of the evidence." 729 F. 2d at 953 (23a).

Moreover, the court of appeals' opinion incorrectly states that "American did not produce any evidence to support its assertion that an engineer would not specify a bearing that a reliable source indicated would fail." 729 F. 2d at 952 (21a). To the contrary, petitioner proffered expert evidence on *precisely* this point. Petitioner's expert witness J. Albert Hudson testified that as the T.V.A. engineer in charge of pollution control equipment he would *not* specify a bearing that a reliable source told him *would* fail. This testimony reads in relevant part as follows:

> "Q. Approximately what does an eight inch by eight inch bearing cost?
>
> A. Maybe $130.
>
> Q. And failure would cost on the order of $200,000?
>
> A. It could.
>
> Q. Knowing the expense, would you, as an engineer, specify a bearing that a reliable source told you would fail?
>
> A. Pardon me?
>
> Q. Would you as an engineer specify a bearing that a reliable source told you would fail?

A. No sir, it would not be a very prudent decision."

This testimony, which was actually read aloud to the court of appeals at oral argument below, makes it impossible to accept the statement of the court of appeals that "American did not produce any evidence to support its assertion that an engineer would not specify a bearing that a reliable source indicated would fail." 729 F. 2d at 952 (21a).

Petitioner's evidence on "fact of damage" complied with this Court's "minimum" standard of proof of "*some* damage flowing from the unlawful [conduct]." *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 U.S. at 114 n. 9. The issue of proximate causation was a question of fact for the jury, which carefully weighed all the evidence, deliberated for 6½ hours, and responded in the affirmative to the special interrogatories submitted to it on this point. The conclusion of the court of appeals on the issue of proximate causation, which was based on its simply ignoring the testimony of two highly qualified witnesses and then making a factual finding that petitioner's evidence was too "limited" to support the jury's verdict, can be reconciled neither with this Court's holding in *Zenith Radio Corp.*, nor with the command of the Seventh Amendment.

CONCLUSION

This Court should grant the petition for writ of certiorari to clarify the scope of the Seventh Amendment and the role of the lower appellate courts in matters involving fact-finding by juries in antitrust cases. In the alternative, it should grant the petition because the actions of the court of appeals in this particular case are irreconcilable with the Seventh Amendment. As Justice Black stated elsewhere, "If . . . the Court of Appeals was wrong in concluding that the evidence was insufficient to go to the jury, then its reversal of the jury's verdict was a violation of the Seventh Amendment, and certainly this is the kind of plain constitutional error that this Court can and should correct." *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 332 (1967) (Black, J., dissenting).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

C. GARY WYNKOOP
SAMUEL R. SIMON
Attorneys for Petitioner

Dated: July 16, 1984

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1248

THE AMERICAN BEARING COMPANY, INC.

v.

LITTON INDUSTRIES, INC. and LITTON INDUSTRIAL PRODUCTS, INC.

American Bearing Company,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 78-2003)

Argued November 14, 1983

Before: ADAMS, BECKER and VAN DUSEN, Circuit Judges

(Filed March 16, 1984)

Samuel R. Simon, Esq.
602 Washington Square South
Philadelphia, PA 19106

and

C. Gary Wynkoop, Esq.
(ARGUED)
Larry Haft, Esq.
Blank, Rome, Comisky
& McCauley
1200 Four Penn Center Plaza
Philadelphia, PA 19013

Attorneys for Appellant

Bruce W. Kauffman, Esq.
(ARGUED)
David H. Pittinsky, Esq.
Lawrence D. Berger, Esq.
Alexandra D. Sandler, Esq.
Jonathan D. Natelson, Esq.
Dilworth, Paxson, Kalish
& Kauffman
2600 The Fidelity Building
Philadelphia, PA 19109
Attorneys for Appellees

OPINION OF THE COURT

VAN DUSEN, *Senior Circuit Judge.*

Plaintiff, American Bearing Company, Inc. ("American"), appeals from the district court's order of May 26, 1982, denying the motion of defendant, Litton Industrial Products, Inc. ("Litton"), for a judgment notwithstanding the verdict but granting a new trial. Plaintiff commenced this action for product defamation, monopolization, and attempted monopolization,

predicating its claims on the dissemination of an allegedly false Litton memorandum that evaluated an American product. A jury found Litton liable for monopolization and attempted monopolization in violation of section 2 of the Sherman Act, 15 U.S.C. §2 (1976), but not for product defamation. The jury awarded American $958,691., which amount the court trebled. See the Clayton Act, 15 U.S.C. §15 (1976 & Supp. IV 1982). Ruling on Litton's post-trial motions, the court, pursuant to Fed. R. Civ. P. 50(b), set aside the jury verdict and ordered a new trial. *See American Bearing Co. v. Litton Industries, Inc.*, 540 F.Supp. 1163 (E.D. Pa. 1982). At the end of the second trial, the district court granted defendant's motion for a directed verdict at the close of plaintiff's case on liability and entered judgment for defendant on March 9, 1983 (5794a). We affirm[1]

I.

American, a New Jersey corporation, manufactures and sells, among other things, bearings for use in construction and industrial applications. Litton, a Delaware corporation, manufactures a wide variety of industrial products and equipment; its Merriman division manufacturers and sells bearings for use in construction and

1. Several other rulings of the district court are not presently before this court. First, plaintiff's complaint named Litton Industries, Inc., Litton's parent corporation, as a co-defendant. The district court granted the directed verdict motion of Litton Industries, Inc.; plaintiff does not challenge this judgment on appeal. Second, the jury's finding that Litton was not guilty of product defamation was not challenged. Third, plaintiff originally challenged two allegedly erroneous evidentiary rulings made at the second trial. At oral argument, plaintiff waived these alleged errors and limited its appeal to the propriety of the district court's decision to grant a new trial (Transcript of Oral Argument filed November 30, 1983, at 2). Consequently, we do not review the rulings made at the second trial.

industrial applications. Both companies manufacture a slide bearing used in electrostatic precipitators and baghouses, types of industrial air pollution control equipment.

Slide bearings are engineered items that are specified and fabricated on a job-by-job basis. They are manufactured in a variety of sizes from a variety of materials, including bronze, meehanite, steel, and Teflon, to meet the builders' specifications. Builders typically specify the parameters at which the bearings will be required to operate and manufacturers of bearings submit bids for those of their bearings that will meet the specifications. Specifications are normally stated in terms of temperature, pressure, and coefficients of friction.[2] Slide bearings are positioned at the structural support points of precipitators and baghouses to permit the structural supports to move freely in response to the expansion and contraction of steel columns.

Until 1975, American manufactured a slide bearing called the "Tetra-slide" bearing; the Tetra-slide bearing, however, could not meet the design specifications for precipitators and baghouses. At this time, Litton held patents on two structural support bearings, "Lubrite F" and "Lubritemp," which were used extensively in precipitators and baghouses.[3] American, realizing

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2. The coefficient of friction measures the bearing's resistance to sliding; it is expressed as a ratio between the horizontal force needed to initiate or maintain free lateral movement and the vertical force that the column exerts on the bearings. A bearing with a low coefficient of friction slides more easily than a bearing with a high coefficient of friction.

3. "Lubrite F" consisted of woven Teflon fiber affixed to a steel plate. Altering the plate could increase or decrease the coefficient of friction (1728a). The "Lubritemp" bearing is a non-metallic bearing which could withstand relatively high temperatures and high loads. Both bearings could satisfy a coefficient of friction requirement of 6% or 7% (1729a).

the potential profit in designing bearings for precipitators and baghouses, attempted to design a bearing that would meet the specifications of builders but would not infringe Litton's patents (247a-52a, 414a-15a). American developed such a bearing, designated it the "Hi-Load" bearing, and eventually patented it. American marketed its bearing as one appropriate for use in high temperature precipitator and baghouse structural support applications. As part of its marketing strategy, American distributed sales samples, measuring two inches by two inches, to potential purchasers in the air pollution control industry.

Litton learned in early 1976 that one of its slide bearing customers, the Carborundum Company ("Carborundum"), was considering the purchase of American's "Hi-Load" bearing (714-15a, 723-25a). The specifications for the Carborundum job required that the bearing be able to withstand 3000 pounds of pressure per square inch ("p.s.i.") and 400° F. temperature. Doubting that American's Hi-Load bearing was capable of meeting the specifications, Litton tested one of American's samples.[4] After conducting the test,[5] Litton drafted a memorandum that

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4. American argues that the samples were fabricated without quality control procedures and were too small to be actual bearings. Nevertheless, Litton invited Carborundum personnel to witness the test. Although they were unable to attend the test session, Carborundum officials "authorized" Litton to proceed with the test and "advise them of the results" (721a).

5. Because Litton's test apparatus required the sandwiching of a movable slide plate between two specimens and because Litton had only one bearing, Litton's engineering supervisor, Moy, obtained two specimens by cutting the lone sample in half. He placed one half above and one half below the moveable slide plate and tested the sample at Carborundum's specifications. American vigorously contends that cutting the sample in half destroyed the sample's structural integrity. Moy, however, satisfied himself that cutting the sample in half was not detrimental for testing purposes.

concluded: "Therefore it is our opinion that this bearing cannot function at the specified load and temperature conditions" (2438a). During the next four years, Litton furnished copies of the memorandum to its salesmen without restricting its distribution. Litton, in fact disseminated the memorandum to purchasing agents and engineers at several pollution equipment manufacturing companies (442-47a).

Finding itself unable to sell the "Hi-Load" bearing, American initiated this suit on June 15, 1978, alleging that the test memorandum was false and that Litton's publication of the memorandum constituted product defamation. Moreover, American asserted that Litton attempted to monopolize, and did monopolize, the market for slide bearings between 1976 and June 15, 1978, in violation of section 2 of the Sherman Act.

II.

Trial commenced on May 19, 1981. American sought to establish its claims by presenting the testimony of four expert witnesses. American's first expert, J. Albert Hudson,[6] explained generally the structure and purposes of precipitators and baghouses. One of Hudson's most important contributions was his testimony that there is an average cost ratio of 0.003 or 0.3% between the cost of slide bearings installed in precipitators and baghouses and the costs of the precipitators and baghouses

6. Mr. Hudson, of Knoxville, Tennessee, was a former chief engineer at the Tennessee Valley Authority.

themselves.[7] American's second expert, Robert W. McIlvaine, testified to national sales statistics for precipitators and baghouses that utilize an inlet gas temperature of 250° or higher. He estimated that the aggregate dollar amount of precipitator and baghouse sales for the years 1976 to 1983 was $3,180,900,000.[8] (696a, 2465a).

Dr. Gary W. Bowman, an Associate Professor of Economics at Temple University, was American's final expert witness. He presented economic testimony to the jury, defined product and geographic markets, estimated the market shares of American and Litton, and estimated the damages American suffered from 1976 to 1983. Dr. Bowman defined "thermal" bearings as bearings which operate with a 3% coefficient of friction while exposed

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7. Consequently, a precipitator costing $1,000,000. could be expected to incur bearing costs totaling $3,000. Hudson also testified that although actual operating temperatures of many baghouses and precipitators might be below 400° F., it was industry practice to use a bearing capable of operating at 400° F. with a low coefficient of friction to provide a margin of safety.

8. Mr. McIlvaine was president of the McIlvaine Co. He described The McIlvaine Co., located in Northbrook, Illinois, as "primarily an information center." The company performs individual client studies on the air pollution control industry; prepares multi-client market research reports; and publishes a "number of publications on the air pollution control industry" (780-81a). McIlvaine testified that his company "cull[ed] knowledge networks" to give individuals and companies technical information on how to select precipitators or baghouses and market information that indicated where new market opportunities might be found (782a). According to Mr. McIlvaine, six companies constructed 50% of the baghouses and precipitators built.

Professor Frederick Roll, of the Department of Civil Engineering at the University of Pennsylvania, was American's third expert witness. He explained relevant engineering concepts to the jury and testified that the Hi-Load bearings produced by American met the specifications of Carborundum (2503a).

to temperature of 400° F. and pressure of 3000 p.s.i. (1263a, 1335a). He gave his opinion that a separate market exists for thermal bearings for use in the support structures of baghouses and precipitators and opined that the market was nationwide. Dr. Bowman was unable to ascertain directly American's damages. Instead, he attempted to calculate damages indirectly by utilizing the sales statistics presented by McIlvaine and the cost ratio presented by Hudson.[9] Dr. Bowman determined the size of the total market for slide bearings simply by multiplying the sales statistics (2465a) by the cost ratio of 0.003 (2719a, 1266-67a). The multiplication process led Dr. Bowman to conclude that from 1976 to 1983 the aggregate sales for the nationwide market for slide bearings capable of operating at 3000 p.s.i., 400° F., with a 3% coefficient of friction, totaled $9,542,700 (2719a). Dr. Bowman offered an opinion as to the market share American would have captured absent the circulation of Litton's test report and estimated the amount of profits American lost as a result of Litton's test report. He concluded that American lost $1,611,279. as a result of Litton's memorandum and related activities (2719a).[10]

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9. No statistics for the annual dollar sales of slide bearings in the proffered market existed. Moreover, American made no effort to reconstruct the parties' respective market shares from Litton's records.

American completed the presentation of its case by presenting the testimony of three allegedly competing bearing manufacturers (1141a-1214a), and the deposition testimony of two bearing purchasers (870a-918a).

10. Litton offered evidence tending to show that baghouse and precipitator manufacturers did not routinely designate specifications of 400° F., 3000 p.s.i., and a 3% coefficient of friction when requesting bids for slide bearings for use in baghouses and precipitators. Litton's evidence showed that bearings other than

(Cont'd)

After three weeks of testimony, the jury returned a verdict in answer to special interrogatories. The jury found that Litton was not responsible for product defamation, but was liable both for monopolization and attempted monopolization in violation of section 2 of the Sherman Act, 15 U.S.C. §2 (1976); it assessed damages in the amount of $958,691. The district court, pursuant to section 4 of the Clayton Act, 15 U.S.C. §15 (1976 & Supp. IV 1982), trebled the jury's award and entered judgment in favor of American in the amount of $2,876.073.

Litton then filed a motion under Fed. R. Civ. P. 50(b) for judgment notwithstanding the verdict or alternatively, for a new trial. In ruling on this motion, the district court held that it should have excluded Dr. Bowman's testimony under Fed. R. Evid. 403 and 703. The basis of this holding was that Dr. Bowman based his testimony on speculation and unsupported assumptions, and that Dr. Bowman calculated damages based on figures which included bearings outside the market which he had defined for purposes of proving monopolization. The district court then ordered a new trial. The court declined to decide whether it would have been justified in granting a judgment n.o.v., deciding instead that a new trial was needed in any event to avoid a miscarriage of justice.

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Teflon-coated bearings were used in precipitators and baghouses and that bearing manufacturers other than Litton supplied bearings for some precipitators and baghouses. Moreover, Litton presented evidence that American's bids were rejected, on at least two occasions, either because American's bearings failed to meet specifications or because American failed to supply independently prepared test reports certifying its testing procedures and facilities.

Pursuant to the court's new trial order, retrial commenced on February 28, 1983. At that trial, the district court made two evidentiary rulings that were adverse to plaintiff's case. Faced with the adverse evidentiary rulings, American presented an offer of proof of the testimony of one of its experts, withdrew the witness, moved its exhibits into evidence, and rested without proving a prima facie case. Defendants moved for a directed verdict, and the district court granted the motion. In its brief filed in this court, plaintiff challenged these two allegedly erroneous evidentiary rulings. At oral argument in this court, however, plaintiff waived its reliance on these allegedly erroneous rulings and limited its appeal to the propriety of the district court's decision to grant a new trial (Transcript of Oral Argument filed November 30, 1983, at 2). Our review, therefore, is limited to reviewing the propriety of the new trial order. If we affirm, the directed verdict plaintiff suffered at retrial will be unaffected. If, however, we should conclude that the district court abused its discretion by granting a new trial, we would remand for reinstatement of the jury verdict.

Because of the deficiencies in American's proof on the subjects of the relevant product market and causation in fact, we hold that the district court properly granted a new trial to prevent injustice and because the verdict was against the weight of the evidence. Since American has waived its objections to any errors in the second trial, we affirm the judgment for Litton.

III.

To determine whether the district court properly granted a new trial under Fed. R. Civ. P. 50(b), we first must determine the appropriate legal standard for granting a new trial under that rule. Fed. R. Civ. P. 50(b) provides, in relevant part:

> "[A motion for] a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and *either* order a new trial or direct the entry of judgment as if the requested verdict had been directed." (Emphasis added.)

In this case, Litton made an alternative motion for a new trial. In such a circumstance, "the motion is tested by the same standards that would apply if the motion were independently made under rule 50." 9 C. Wright & A. Miller, *Federal Practice & Procedure*, §2539, at 608 (1971). A district court, therefore, may grant a new trial if required to prevent injustice or to correct a verdict that was against the weight of the evidence. *Thomas v. E.J. Korvette, Inc.*, 476 F.2d 471, 474-75 (3d Cir. 1975); 6A J. Moore, *Moore's Federal Practice*, ¶59.08[5], at 59-140, 59-152 (2d ed. 1982). "The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam), and will only be disturbed if the district court abused that discretion.[11] We, therefore, review

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11. Plaintiff argues that the district court may only grant a new trial under Rule 50(b) when the moving party would be entitled to judgment notwithstanding the verdict. According to plaintiff, if the jury verdict is supported by enough evidence so that judgment n.o.v. would not be warranted, the district court would be powerless to grant a new trial under Rule 50(b). *See, e.g., Peterman v. Chicago, Rock Island & Pacific Railroad Co.*, 493 F.2d 88, 92 (8th Cir. 1974) (district court precluded from granting new trial under Rule 50(b) when it denies judgment n.o.v.). Plaintiff's reliance on *Peterman*, however, is misplaced. The rule announced in *Peterman* only applies when the verdict loser fails to move in the alternative for a new trial. *See* 9 C., Wright & A. Miller, *supra* at §2538 (if motion for judgment n.o.v. "must be denied, the court has no power to order a new trial in favor of the moving party. . .unless a motion for a new trial has been joined in the alternative with the motion for judgment"). The district court's denial of the judgment n.o.v. motion, therefore, is not relevant when the moving party makes the alternative new trial motion.

the district court's new trial order to determine whether the district court abused its discretion.

IV.

As an antitrust plaintiff seeking treble damages under section 4 of the Clayton Act, 15 U.S.C. §15 (1976), American must prove three elements: (1) an antitrust violation, in this case a violation of section 2 of the Sherman Act; (2) fact of damage or injury; and (3) measurable damages.[12] *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 207, 209 (3d Cir. 1983); *Deaktor v. Fox Grocery Co.*, 475 F.2d 1112, 1116 (3d Cir.), *cert. denied*, 414 U.S. 867 (1973). It is upon the first two elements, proof of a violation of section 2 of the Sherman Act and fact of injury, that this case turns.

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12. Section 4 provides, in part:

> "(a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . ."

15 U.S.C. §15.

Section 2 of the Sherman Act, as amended, provides in part:

> "Every person who shall monopolize, or attempt to monopolize,. . .shall be deemed guilty of a felony. . . ."

15 U.S.C. §2.

A.

To prove a violation of section 2, American must prove either monopolization or attempted monopolization. Both monopolization and attempted monopolization claims require American to present sufficient evidence to permit a jury to find that the defendant possessed the requisite market power necessary to constitute a monopoly. The market power analysis begins with a definition of the relevant product market for the particular product, *United States v. duPont & Co.*, 351 U.S. 371, 393 (1956), and is an element of a section 2 violation that plaintiff must establish to prevail. Without a definition of the relevant market, the defendant's ability to exclude competitiors cannot be determined. *Walker, Inc. v. Flood Machinery,* 382 U.S. 172, 177-78 (1965); *Edward J. Sweeney & Sons, Inc. v. Texaco,* 637 F.2d 105, 117 (3d Cir. 1980), *cert. denied,* 451 U.S. 911 (1981); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975). The outer boundaries of a product market are determined by the reasonable interchangeability of use between the product itself and substitutes for it. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *duPont & Co.*, 351 U.S. at 393.[13] Within a broad product market, submarkets, which constitute product markets for antitrust purposes, may exist. *Brown Shoe*, 370 U.S. at 325. To establish that "thermal bearings" comprised a relevant product market or submarket, American, therefore, had to prove that a significant number of potential purchasers did not consider the bearings manufactured by American and Litton reasonably interchangeable with bearings produced by other bearing

13. Although *Brown Shoe* was decided under §7 of the Clayton Act, it has been readilty applied in cases initiated under §2 of the Sherman Act. *See, e.g., Columbia Metal, Etc. v. Kaiser Alum., Etc.*, 579 F.2d 20, 27 & n.11 (3d Cir.), *cert. denied,* 439 U.S. 876 (1978).

manufacturers. Evidence of "industry of public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors" must be presented. *duPont & Co.*, 351 U.S. at 393, 395, 399-40; *Brown Shoe*, 370 U.S. at 327; *Edward J. Sweeney*, 637 F.2d at 117. American's evidence on this point was unpersuasive and failed to rebut Litton's evidence that many manufacturers were competitors in the market for bearings in baghouses and precipitators. Litton could not have had market power in the market established by its evidence, and a verdict predicated on the market American sought to prove would be against the weight of the evidence.

Instead, even at this stage in the litigation, the precise product market that American seeks to define is ambiguous. At trial and in its brief, American sought to establish that the relevant product market was a narrow one, limited to those slide bearings which operate at "400 degrees Fahrenheit, 3,000 pounds per square inch and 3 per cent coefficient of friction."[14] At oral argument, however, American asserted that the relevant product market consists of those bearings used at the support points of all

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14. On p. 11 of its brief, American asserted that: "The relevant market in this case is the national market for slide bearings capable of operating a coefficient of friction of 3% while exposed to temperature of 400° F and pressure of 3000 psi." Again, in its reply brief, American states that one of the company's owners testified as to the relevant product market. The owner, Mr. Furchak, testified that the manufacturers of high-temperature pollution control equipment require bearings that will function at a coefficient of friction of 3% or less while exposed to temperature of 400° F. and pressure of 3000 p.s.i. (250a-251a). Moreover, Dr. Bowman, the expert who, according to p. 7 of American's brief, "defined the relevant product and geographic markets," testified on direct examination:

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> "A. [by Dr. Bowman] I was asked to analyze the area of thermal bearings to see whether or not, well, to analyze first to determine whether there is a market for thermal bearings.
>
> Having determined that if this indeed was the case, to see whether or not they lost money because of certain activities of the market, to look at this market broadly, analyze the industry, a traditional study, and see what conclusions came out of that."
>
> "Q. Do you have an opinion Dr. Bowman, as to whether or not there is a market for thermal bearings."
>
> * * *
>
> [Dr. Bowman] "Certainly. Thermal bearings are bearings which are slide bearings which operate at about 400 degrees Fahrenheit, 3000 pounds per square inch and 3 percent coefficient of friction."

(1262a-1264a, 1335a).

There is an extremely close question whether Dr. Bowman's testimony defining the relevant market is admissible. Dr. Bowman calculated the aggregate amount of bearing sales by multiplying the total sales figures of precipitators and baghouses provided by Mr. McIlvaine by the .3% cost ratio estimated by Mr. Hudson (2719a). Dr. Bowman, therefore, implicitly assumed that Litton and American were the sole suppliers of bearings to the entire baghouse and precipitator industry, an assumption for which there is no support in the record. *See* part IV-A *infra*. When he attempted to define a relevant market, however, Dr. Bowman opined that the market consisted only of those bearings capable of performing at 3000 p.s.i., 400° F., and 3% coefficient of friction. Finding that "there was no reliable or admissible evidence upon which the jury or the economist [Dr. Bowman] could determine the extent to which bearings outside of this market should have been deducted," and noting that the market which

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precipitators that operate above 250 degrees internal temperature" (Transcript of Oral Argument filed November 30, 1983, at 12-13). American's position apparently is that they should prevail and the jury's verdict reinstated if evidence could support a finding

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he defined for purposes of finding liability was inconsistent with the figures he used to calculate damages, the district court held that Dr. Bowman's testimony should have been excluded under Fed. R. Evid. 403 and 703.

The district court's reliance on Rule 703 has been called into question by this court's holding in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983). Rule 403 gives the trial court broad discretion to weigh proffered testimony before determining whether the evidence should be excluded. In making its determination, the court engages in a balancing process, "weighing the probative value of proffered evidence" against "the dangers and considerations enumerated in Rule 403." *United States v. Long*, 574 F.2d 761, 768 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978) (Adams, J., concurring). Courts have invoked Rule 403 to exclude expert testimony when its probative value is substantially outweighed by the possibility of misleading or confusing the jury. 1 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶403[04], at 403-38 to 403-42 (1983). *See, e.g., City of New York v. Pullman*, 662 F.2d 910, 915 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) (evidence that has special aura of infallibility properly excluded under Rule 403); *Marx & Co. v. Diner's Club, Inc.*, 550 F.2d 505, 511 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977) (expert's dogmatic conclusion, though relevant, excludable under Rule 403).

In this case, the probative value of Dr. Bowman's testimony was minimal. As the district court correctly found, the speculation and unfounded assumptions underlying Dr. Bowman's testimony decreased its probative value, perhaps to the level of the gossamer. On the other hand, the inconsistencies between that part of Dr. Bowman's testimony that defined a relevant market and that addressing market share and damages increased the likelihood that his testimony would confuse and mislead the jury. A very strong case can hence be made for excluding Dr. Bowman's testimony under Fed. R. Evid. 403, and possibly under Rule 703, notwithstanding *Japanese Electronics*. We need not, however, reach the evidentiary issue in view of our disposition of the case. Accordingly, we will assume that Dr. Bowman's testimony was properly before the jury.

that either product market existed. We disagree. Instead, "we hold an antitrust plaintiff in an appeal to the theory advanced at trial." *Edward J. Sweeney*, 637 F.2d at 117. Accordingly, we review the evidence to determine whether American presented sufficient evidence to enable a jury to find that a submarket, consisting of slide bearings which operate at 400 degrees Fahrenheit, 3000 p.s.i., and 3% coefficient of friction, exists.

The only evidence on which the jury could have found that such a market existed was Dr. Bowman's testimony. As noted above, *see supra* note 14, Dr. Bowman's testimony was self-contradictory. On the other hand, the rest of the evidence strongly suggests that the bearings of both American and Litton competed in a far broader market. The coefficient of friction parameter best illustrates the problem. An examination of the specifications for thirteen jobs indicates that only two of the thirteen called for bearings capable of operating with a coefficient of friction of 3% (3800a). The coefficient of friction specifications, instead, cover a range from 3% to 15%, with the majority falling in the 6% to 10% range (3800a). One of American's experts, Dr. Roll, after examining specifications provided by American and specifications selected for his review by United Engineers, a large construction design company which designs precipitators, determined that the typical design specifications covered a broad range of temperature, pressure, and friction parameters. Roll concluded that:

> "The actual service load conditions depend upon the design specifications for the particular structure under construction. Typical service load conditions for power plant requirements, for example, specify temperature of 350° F to 500° F, loads equivalent

> to bearing pressures of 2000 psi to 6000 psi, and bearing areas of approximately 5 ins. x 5 ins. to 8 ins. x 8 ins. Typical required coefficients of friction range from 3% to 15%, *with the majority in the 6% to 10% range.*" (Emphasis added.)

(2479a). Moreover, specifications from fifteen jobs on which American submitted bids between 1976 and 1979 demonstrate that a submarket consisting of 400° F., 3000 p.s.i., and 3% coefficient of friction did not exist. Instead, each job involved a potential sale to a manufacturer of precipitators or baghouses and each involved performance parameters different from 400° F., 3,000 p.s.i., and 3% coefficient of friction. Only two of the fifteen specifications required a coefficient of friction as low as 3%. In contrast, several of the specifications called for coefficients of friction of 10% of greater (Supp. App. at 101a, 103a, 110a). Because precipitator and baghouse specifications typically require bearings to operate at coefficients of friction higher than 3%, bronze and meehanite bearings, which cannot provide a 3% coefficient of friction but which can and do satisfy specifications for 10% and above, belong among competing products in the relevant market (583a, 588a, 2014a).[15] The tabulation of slide bearing costs submitted by one precipitator design company, Belco Pollution Control Corporation, to Mr. Hudson demonstrates that meehanite competes with the Teflon bearings. Of eight precipitator

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15. American argued at trial and on appeal that the "Hi-Load" bearing allows lighter support structure which gives "Hi-Load" bearings an extreme cost advantage. According to American, you can substitute these bearings for bronze and meehanite but cannot substitute bronze and meehanite bearings for Teflon bearings (Transcript of Oral Argument filed November 30, 1983, at 14-15). Nevertheless, "where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differed from others." *duPont & Co.*, 351 U.S. at 394.

jobs listed by Belco, four specify that the slide bearings used were not Teflon at all but meehanite (1337a-38a, 1450a, 1452a). Moreover, American's president, Mr. Roman, admitted that the Cosmec Company manufactured bearings that routinely competed with those manufactured by Litton and American. Cosmec, a manufacturer of Teflon, bronze, and meehanite bearings, routinely bid for precipitator jobs calling for bronze and meehanite (604a-05a, 611a). Despite Mr. Roman's admission, American defined the relevant market to exclude bearings manufactured by Cosmec that routinely competed with bearings manufactured by Litton and American.

In addition, data supplied by American Air Filter, another precipitator design company, indicates that every single precipitator job included in its tabulation used Fluorogold slide bearings, a Teflon bearing manufactured by Fluorocarbon (194a). Wheelabrator-Frye, a major designer of precipitators and baghouses (3373a-74a), specified "self-lubricating slide bearing plates similar to or equal to type FC1010CS as manufactured by the Fluorocarbon Co." for use in its baghouses (3120a). Neither Fluorocarbon nor its products, however, appear in the narrowly defined submarket that American defined. Such relevant submarket, therefore, failed to account for a competitor whose Teflon slide bearings were used in every precipitator designed by one of the industry's major manufacturers and designated as the standard by a second manufacturer.

Even if Dr. Bowman's testimony was properly before the jury,[16] on this record, a verdict predicated on a submarket for bearings capable of meeting the specifications of 400° F., 3000

16. *See supra* note 14.

p.s.i., and 3% coefficient of friction is clearly against the weight of the evidence and would constitute a seriously erroneous result. 6A J. Moore, *Moore's Federal Practice*, ¶59.08[5], at 59-147 (2d ed. 1983). A new trial was therefore necessary, and was certainly not an abuse of discretion.

B.

A similar problem exists with respect to American's evidence establishing injury-in-fact. Even if it established an antitrust violation, to prevail American also must establish that the violation was a material cause of some injury to its business. *Zenith Radio Corp. v. Hazeltine*, 395 U.S. 100, 114 n.9 (1969); *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 (3d Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Rea v. Ford Motor Company*, 497 F.2d 577, 589 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974). The evidence "linking the illegality and the injury must be more precise than that needed to establish the amount of damages." *Van Dyk Research*, 631 F.2d at 255; *Rea*, 497 F.2d at 589.

Unable to secure direct evidence of causation, American resorted to circumstantial evidence. American offers three instances of how dissemination of Litton's test memorandum allegedly caused injury to its business. First, the president of American, Dr. Roman, testified that shortly after developing the "Hi-Load" bearing he was well received by potential purchasers. After dissemination of Litton's memorandum, however, the reception turned "very, very cold" (405a). Second, American points to the fact that because bearings cost $130. each and that bearing failure could cost the companies approximately $200,000., a jury could reasonably infer that an engineer would not specify a bearing that a reliable source indicated would fail (Transcript of Oral

Argument, filed November 30, 1983, at 30-31). Third, American notes that it lost two specific jobs immediately after Litton circulated the test report, even though American's bids were substantially lower than Litton's (636-46a). American argues that the jury was entitled to infer from this circumstantial evidence that Litton's conduct was a material cause of American's injury.

In *Edward J. Sweeney*, 637 F.2d at 116, this court stated that "[i]nferred factual conclusions based on circumstantial evidence are permitted only when, and to the extent that, human experience indicates a *probability* that certain consequences can and *do* flow from the basic circumstantial facts. . .[A]ssuming a causal connection between two events merely because one follows the other" is insufficient. *Id.* We believe that American's evidence on this point was sufficiently weak that a new trial could appropriately have been granted on this ground as well, because the jury's verdict on this point was against the weight of the evidence and constituted a miscarriage of justice.

American failed to offer any supportive evidence that the cool reception Dr. Roman received in the industry was attributable to dissemination of the Litton memorandum. Moreover, American did not produce any evidence to support its assertion that an engineer would not specify a bearing that a reliable source indicated would fail. Instead, there was substantial evidence to the contrary from potential customers who testified that their refusal to purchase American's Hi-Load bearing was for reasons unrelated to Litton's memorandum. Mr. Fred Clements, a structural engineer supervisor for a major manufacturer of precipitators and baghouses, Research-Cottrell, testified that American was not on its approved vendor list because American had not supplied sufficient engineering data and because Research-Cottrell had experienced trouble with a sheet Teflon bearing similar to the

Hi-Load bearing in the past. Similarly, Mr. John Rupak, a purchasing agent for Wheelabrator-Frye, testified that it stopped soliciting bids from American because American failed to comply with Wheelabrator-Frye's standard certifying procedure. Wheelabrator-Frye required bearing manufacturers to submit neutral laboratory data certifying that the bearing would meet their required temperature and pressure conditions (912-17a). Finally, Mr. Robert Baker, manager of quality assurance and control at Combustion Engineering, another precipitator and baghouse manufacturer, testified that Combustion Engineering would not award any jobs to American until American provided sufficient information concerning the capabilities of its Hi-Load bearing, information American did not submit (2076-79a).

Finally, the record included substantial evidence that American, despite being the low bidder on two jobs for United Oil Products, lost the jobs to Litton for reasons unrelated to the Litton memorandum. Dr. Roman admitted that American's bid for one of the two jobs was late and for a bearing of the wrong size. Moreover, a letter introduced into evidence indicated that American believed these bids were lost because of an asserted conflict of interest between United Oil Products and another bearing manufacturer, the Allan P. James Company, not because of Litton's memorandum (453-56a, 1926-28a).

Although American did not have to present uncontroverted evidence to prevail, it did need to demonstrate a "probability that certain consequences can and do flow from the basic circumstantial facts." *Edward J. Sweeney,* 637 F.2d at 116. In light of the explanations offered by United Oil Products, and the limited evidence offered to substantiate American's allegations, we conclude that a new trial was proper on the grounds that the jury's verdict, premised on the conclusion that Litton's

memorandum caused American's damages, was against the weight of the evidence and would have resulted in a miscarriage of justice.

Accordingly, the March 9, 1983, judgment of the district court (5974a) will be affirmed.[17]

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17. Because we determine that American failed to establish a relevant product market, we find it unnecessary to reach other issues covered in the district court's opinion or raised on this appeal. Our decision to affirm means that the district court properly granted a new trial at the conclusion of the first trial. In view of the directed verdict for the defendant at the second trial and plaintiff's waiver of alleged errors at that trial, American is not entitled to modification of the district court judgment of March 9, 1983.

A TRUE COPY:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

DISTRICT COURT OPINION

The AMERICAN BEARING COMPANY, INC.

v.

LITTON INDUSTRIES, INC. and Litton Industrial Products, Inc.

Civ. A. No. 78-2003

United States District Court,
E.D. Pennsylvania

May 26, 1982

MEMORANDUM

RAYMOND J. BRODERICK, District Judge.

This case comes before the Court on the post-trial motion of defendant Litton Industrial Products, Inc. for judgment notwithstanding the verdict or, in the alternative, for a new trial. The jury returned a verdict finding Litton liable for both monopolization and attempted monopolization in violation of §2 of the Sherman Act and assessed damages in the amount of $958,691.00. For the reasons set forth below, the Court has determined to grant a new trial with respect to plaintiff's §2 Sherman Act claims.

Respect for the collective wisdom of the jury is sufficient in most cases to enable the judge to accept the findings of the jury regardless of his own doubts in the result reached by the jury. However, the trial judge must grant a new trial when his failure to do so would result in a miscarriage of justice. I find that there has been a miscarriage of justice in this case.

District Court Opinion

I. BACKGROUND

Plaintiff American Bearing Company, Inc. is a New Jersey corporation that was formed in 1970 by Ronald L. Roman and Robert A. Furchak. The offices and manufacturing facilities of American Bearing Co. are located in Fairfield, New Jersey. Defendant Litton Industrial Products, Inc.[1] is a Delaware corporation which manufactures a wide variety of industrial products and equipment and its Merriman Division, located in Hingham, Massachusetts, manufactures and sells a variety of bearings for use in construction and industrial applications [both Litton Industrial Products, Inc. and its Merriman Division will hereinafter be referred to collectively as Litton]. The plaintiff American Bearing Co. (American Bearing) also manufactures bearings for use in construction and industrial applications. One type of bearing which they both manufacture is called a slide bearing.

Slide bearings are used in the heavy construction industry to allow structures to move in response to the expansion and contraction of their component materials. Slide bearings are manufactured in a variety of sizes and are made from a variety of materials such as bronze, meehanite and steel. The different base materials from which the bearings are made, together with other factors such as the coating affixed to the bearing's surface and lubricants used in conjunction with the bearing, affect the parameters at which the bearing can operate, expressed in terms of temperature, pressure per square inch and coefficient of friction. The type of bearing which can be used in a given structure varies

1. Litton Industries, Inc., Litton's parent corporation, was also named as a defendant, but was dismissed by the Court.

according to the type and size of each structure. Typically, the builder or manufacturer of a given structure will designate the parameters at which the bearing will be required to operate and the bearing manufacturers will then submit bids for those of their bearings which will meet the requirements of the given job. Sometimes the builder or manufacturer of the structure will also specify the type of bearing preferred for use, such as a bronze or meehanite bearing.

Among the structures which require the use of slide bearings are electrostatic precipitators and baghouses which are huge structures used to control pollution by removing harmful elements from industrial discharges. Due to the large size and high operating temperatures of these structures they require slide bearings which can operate at high temperatures and pressures. In early 1975 Litton began selling slide bearings for use under electrostatic baghouses and precipitators. Although other types of bearings were also being used in baghouses and precipitators, a teflon-coated bearing developed and patented by Litton became very popular for use in these structures because it could operate at high temperatures with a low coefficient of friction while under heavy load conditions. Because of its patent, Litton was virtually the only source of teflon-coated bearings.

Sometime in 1975 American Bearing, a company formed by Ronald Roman and Robert Furchak, began developing a new method of producing a teflon-coated bearing. Beginning in or about June 1975, American Bearing began contacting potential purchasers of this bearing and distributed literature promoting its use. The literature distributed by American Bearing said that the bearing, which American Bearing called its "Hi-Load" bearing, would work at specifications of 400°F, 3000 pounds p.s.i., with a 3% coefficient of friction. In connection with the promotion

of its bearing, American Bearing prepared 2" by 2" sample bearings for use as sales aids. American Bearing made its first sale and shipment of production bearings in May or June of 1976.

In or about March 1976 one of Litton's salesmen obtained one of the American Bearing sample bearings. During the course of two days, Litton subjected the bearing to 16 hours of testing after first cutting the bearing in half. The results of the testing, together with a conclusion which stated "Therefore it is our opinion that this bearing cannot function at the specified load and temperature conditions", were set forth in a test report dated March 26, 1976. The conclusion stated in the report was based on the observation that the surface of the bearing exhibited some cracking and "extruding". Litton sent the test report to a number of precipitator and baghouse manufacturers and gave copies to their (Litton's) sales personnel for use in the field.

On June 15, 1978, American Bearing initiated this suit alleging that Litton's test report was false and that its publication by Litton constituted product defamation. In addition, American Bearing asserted that Litton had attempted to monopolize and/or monopolized the market for slide bearings between 1976 and June 15, 1978.

At trial, American Bearing presented testimony, the thrust of which was that Litton knew or should have known by the size of the bearing and the attendant circumstances that the tested bearing was a sample — a sales aid as opposed to a functional bearing and had not been manufactured with the intention that anyone would use it. Furthermore, it was testified that cutting the bearing in half, as Litton did for its tests, destroyed its structural integrity. In addition, Professor Roll, an expert testifying on behalf of

American Bearing, stated that he had tested functional teflon-coated bearings produced by American Bearing and that they met the specifications stated by American Bearing.

In addition to Professor Roll, American Bearing also presented the testimony of three other expert witnesses: Mr. Albert Hudson, Mr. Robert McIlvaine and Professor Gary Bowman (hereinafter "economist"). Mr. Hudson's experience in this field included a period of employment as the Head Mechanical Engineer for the Tennessee Valley Authority Fossil and Air Pollution Control Equipment in which capacity he organized and directed the largest air pollution retrofit program in the utility industry. Mr. Hudson supplied general information relating to the structure and purposes of baghouses and precipitators and the advantages inherent in the use of teflon-coated slide bearings in those structures. Mr. Hudson testified that although the actual operating temperatures of many baghouses and precipitators may be below 400° it was the practice in the industry to use a bearing capable of operating at 400° with a low coefficient of friction in order to allow an ample margin of safety. Mr. Hudson also testified that the relationship between the cost of slide bearings relative to the flange to flange cost of precipitators and baghouses in such that these bearings account for .3% of the flange to flange cost.

Mr. Robert McIlvaine offered his expert opinions and conclusions with respect to the national market for "hot" precipitators and fabric fibers (baghouses), that is, precipitators and baghouses which operated in excess of 250°. Mr. McIlvaine presented figures representing the dollar value for the sales of "hot" precipitators and baghouses in the national market for the years 1976-80 with projections of sales through 1983 and testified as to the market shares of various baghouse and precipitator manufacturers.

The economist whose testimony, together with that of Messrs. Hudson and McIlvaine, is discussed in greater detail later in this memorandum, testified with respect to a market study he conducted of the "thermal" bearing industry. The economist defined a "thermal" bearing as a bearing which operates at 400°F, at a pressure of 3000 pounds p.s.i., with a 3% coefficient of friction. He gave his opinion that a separate product market exists for thermal bearings for use in the support structures of baghouses and precipitators and that the geographical scope of the market is nationwide. Using the figures calculated by Messrs. Hudson and McIlvaine, he calculated the size of the relevant market in terms of the total dollar amount of sales of thermal bearings for the years 1976-1983. He also offered his opinion as to the share of the market American Bearing would have attained in the absence of any illegal conduct, as well as to the actual market shares of American Bearing and Litton for the years 1976-1980. The economist also testified that American Bearing's failure to achieve the projected market shares was attributable solely to Litton's circulation of a false test report. Lastly, he calculated the amount of profits American Bearing purportedly lost in the past and would continue to lose through 1983 as a result of Litton's circulation of the test report.

Litton, on the other hand, offered evidence that it had manufactured sample bearings in the past, and that the bearings were functional and that Litton had performed tests on its sample bearings. Litton also offered evidence tending to show that baghouse and precipitator manufacturers did not as a routine practice designate specifications of 400°F, 3000 pounds p.s.i., and a 3% coefficient of friction when requesting bids for slide bearings to be used in their baghouses and precipitators and that bearings other than teflon-coated bearings could and, in some instances, were used in electrostatic precipitators and baghouses. In addition,

Litton presented evidence that American Bearing's bids were rejected because of its failure to meet the requirements for bidders specified by the baghouse and precipitator manufacturers, such as bid submission deadlines or the submission of a test report pertaining to their bearing prepared by an independent library.

On July 9, 1981, after three weeks of trial, the jury rendered a verdict on special interrogatories in which it found that Litton was not liable for product defamation, but was liable for both monopolization and attempted monopolization in violation of §2 of the Sherman Act and assessed damages in the amount of $958,691.00. Pursuant to Section 4 of the Clayton Act, 15 U.S.C. §15, the Court entered judgment in favor of American Bearing on June 10, 1981 in the trebled amount of $2,876,073.00. Litton then filed the motions now before the Court.

II.

STANDARDS FOR GRANTING MOTIONS FOR JUDGMENT N.O.V. AND NEW TRIAL

In order to grant a motion for judgment n.o.v. the Court must find as a matter of law that the plaintiff failed to adduce sufficient facts to justify the verdict. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir. 1970), *cert. denied*, 400 U.S. 826, 91 S. Ct. 51, 27 L. Ed. 2d 55 (1970). Such a motion "may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." 5A *Moore's Federal Practice*, ¶50.07[2] at 50-77 (footnote omitted) (2d ed. 1974); *Thomas v. E.J. Korvette, Inc.*, 476 F.2d 471, 474 (3d Cir. 1973). In making this determination "it is the duty of the trial court to take that view of the evidence most favorable to the party against whom the

motion is made . . ." 6A *Moore's, supra,* ¶59.08[5] at pp. 59-152 (1979); *Bonjorno v. Kaiser Aluminum & Chemical Corp.,* 518 F. Supp. 102, 105 (E.D. Pa. 1981).

Motions for a new trial require the exercise of discretion by the Court, whose "duty is essentially to see that there is no miscarriage of justice." 6A *Moore's, supra* ¶59.08[5], at 59-160 (footnote omitted) (1976), *Thomas v. E.J. Korvette, Inc.,* 476 F.2d 471, 474-75 (3d Cir. 1973). The jury's verdict may be set aside only if manifest injustice will result if it were allowed to stand. The Court may not substitute its own judgment for that of the jury merely because the Court may have reached a different conclusion.

III.

LITTON'S MOTION

Litton has asserted numerous and overlapping arguments in support of its motions for judgment n.o.v. or a new trial. In general, Litton claims that American Bearing produced insufficient evidence to support the jury's verdict on the §2 Sherman Act claims in several material respects; that portions of the Court's jury instructions relating to the Sherman Act claims were erroneous, and; that the Court erred in various evidentiary and discovery rulings, particularly in its failure to grant Litton's motions to strike the testimony of the plaintiff's economist.

At the hearing on Litton's motion, held on February 19, 1982, counsel for Litton focused on the following contentions with respect to its claim for judgment n.o.v.: (1) American Bearing failed to prove that Litton's allegedly unlawful conduct was the proximate cause of injury to American Bearing; (2) that there

was insufficient evidence for the jury to find that the relevant market as defined by American Bearing existed and insufficient evidence for the jury to determine the parties' market shares; and (3) that American Bearing failed to prove the exercise of monopoly power by Litton. Litton's argument relating to American Bearing's purported failure of proof centered upon the expert testimony of plaintiff's economist whose testimony constituted an integral part of the proof offered by American Bearing in support of its Sherman Act claims. Litton asserts that his testimony was based on numerous unsupported assumptions and was too speculative and misleading to prove a sufficient basis for the jury's verdict. In addition, Litton argued that the speculative and misleading nature of the economist's testimony, his reliance on unsupported assumptions and his alleged reliance on heresay statements of a type not reasonably relied upon by experts in the field rendered his testimony inadmissible and that the Court erred in failing to strike his testimony as requested by Litton at trial.

IV.

LITTON'S ARGUMENTS RELATING TO THE TESTIMONY OF PLAINTIFF'S ECONOMIST

Litton's arguments in support of its motions for judgment n.o.v. and a new trial are for the most part grounded upon the expert testimony of plaintiff's economist. At trial, Litton moved to strike his testimony in its entirety, asserting that it was speculative, misleading, based on unsupported assumptions and based on heresay statements of a type not reasonably relied upon by experts in the field. Litton now asserts that the Court erred in denying its motion to strike and relying essentially on these same arguments, asserts that the testimony of the economist was

not sufficient evidence upon which a jury could have determined the relevant market and market shares, the existence of proximate cause and the amount of damages. Since the Court has determined that certain critical portions of the economist's testimony should have been stricken for reasons hereinafter discussed and that there has been a miscarriage of justice, the only appropriate remedy is a new trial. Therefore, a lengthy review of the sufficiency of the evidence would be fruitless since, under these circumstances, even if the remaining evidence is insufficient to support the jury's verdict, the Court, in the interest of justice, will exercise its discretion under Fed. R. Civ. Pro. 50(b) and will order a new trial and will deny the motion for judgment n.o.v. in favor of Litton. *Cone v. West Virginia Pulp & Paper,* 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849 (1947); 5A *Moore's Federal Practice,* ¶50.11.

A. The Applicable Legal Principles

Rule 703 of the Federal Rules of Evidence provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those preceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Under Rule 703 an expert may testify to an opinion based on information which is not necessarily admissible into evidence provided the information is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences

upon the subject." *Zenith Radio Corporation v. Matsushita Electric Industrial Co., Ltd.*, 505 F. Supp. 1313, 1322 (E.D. Pa. 1980) [hereinafter *Zenith Radio*].

When an expert bases an opinion upon facts or data which are not in evidence the question as to whether the facts or data are of the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject is a matter to be determined by the court. As stated by Judge Becker in *Zenith Radio, supra,* at 1325, ". . . it is nonetheless plain that courts routinely make the decision whether a particular expert has reasonably based his opinions upon trustworthy underpinnings. * * * Moreover, any other result would open the door to wholesale admission of otherwise inadmissible evidence before the jury not, to be sure, as probative of the truth, but to explain the expert's opinion. Such a result could not have been contemplated by the rule."

In *Zenith Radio, supra,* a case in which the court determined, in advance of trial, the admissibility of opinions expressed in various expert reports, the court noted that Rule 703 had evolved from an exception to the hearsay rule which had been employed in a number of jurisdictions and which was originally limited to a "traditional mainstream" of cases which the court identified as: cases in which a physician was permitted to testify based upon information received from nurses, patients, radiologists, pathologists, etc.; cases involving expert testimony relating to land valuation based upon comparable sales, and; cases in which courts permitted experts to testify as to the valuation of businesses based upon diverse background sources, including accounting data. See discussion of the history of Rule 703 in *Zenith Radio, supra* at pp. 1321-1324. Based upon a thorough review of the cases precursing Rule 703, the cases applying Rule 703, Rule 703 itself,

the Advisory Notes, and the history of the Rule, Judge Becker set forth a list of factors to be used to guide a court in determining the reasonableness of reliance under Rule 703 in cases falling outside this traditional mainstream of cases. These factors are:

> 1. The extent to which the opinion is pervaded or dominated by reliance on materials judicially determined to be inadmissible, on grounds of either relevance or trustworthiness;
>
> 2. The extent to which the opinion is dominated or pervaded by reliance upon other untrustworthy materials;
>
> 3. The extent to which the expert's assumptions have been shown to be unsupported, speculative, or demonstrably incorrect;
>
> 4. The extent to which the materials on which the expert relied are within his immediate sphere of expertise, are of a kind customarily relied upon by experts in his field in forming opinions or inferences on that subject, and are not used only for litigation purposes;
>
> 5. The extent to which the expert acknowledges the questionable reliability of the underlying information, thus indicating that he has taken that factor into consideration in forming his opinion; [The court added in a footnote that it would limit the applicability of this criterion to close cases of admissibility because an expert who was a true "hired gun" could always surmount it.]

> 6. The extent to which reliance on certain materials, even if otherwise reasonable, may be unreasonable in the peculiar circumstances of the case.

Zenith Radio, supra at 1330. Since the nature and basis of the opinions at issue in this case fall outside the "mainstream" of cases heretofore described, we believe the above factors are a relevant and useful guide for determining whether certain critical portions of the economist's testimony should have been stricken pursuant to Rule 703.

Another rule relevant to this Court's determination as to the admissibility of certain portions of the economist's testimony is Rule 403 of the Federal Rules of Evidence which provides:

> Although relevant, evidence may be excluded in its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

It is apparent that when considering the admissibility of expert testimony, Rules 703 and 403 somewhat overlap in that an opinion which is deemed inadmissible under one of the rules may also be deemed inadmissible on the basis of the other. As the court noted in *Zenith Radio, supra* at 1328, after reviewing a number of cases in which expert testimony was excluded by the court,

> Even when the issue is plainly admissibility, it is not always clear what rule is used as the basis for the court's decision. For example, as alternative

> theories, some courts deem an opinion based on unsupported assumptions to be unhelpful to the jury under F.R.E. 702, . . . or to be so misleading as to be excludable under F.R.E. 403, instead of being unreliably based under F.R.E. 703. In any event, all of the above cited cases [see Zenith Radio at pp. 1327-28] refuse to countenance expert testimony based upon what the courts determine to be unreasonable assumptions. Despite the variety of procedural contexts and variety of F.R.E. pigeonholes, they indicate that the assumptions which form the basis for the expert's opinion, as well as the conclusions drawn therefrom, are subject to rigorous examination.

Therefore, in light of the above discussion, this Court will carefully examine the underlying assumptions, inferences drawn and conclusions reached by the plaintiff's economist. See *Zenith Radio* at 1333. In so doing the Court will consider the various elements heretofore set forth with respect to reasonable reliance under Rule 703 and whether the probative value of the testimony is outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury or by the other considerations set forth in Rule 403.

B. The Economist's Testimony Relating to the Size of the Relevant Market and Market Shares

In his testimony relating to the size of the relevant market and Litton's and American Bearing's respective shares of the relevant market, the economist testified that for the years 1976, 1977, 1978, and 1979 American Bearing had, respectively, market shares of 5%, 5%, 5%, and 17%. Based upon the deposition

and trial testimony of some of the buyers of thermal bearings (bearings which operate at 400°F, 3000 pounds p.s.i. with a 3% coefficient of friction) he concluded that American Bearing and Litton were the only sellers of thermal bearings during 1976, 1977 and 1978 and, therefore, that during these years Litton maintained a 95% share of the thermal bearing market. Since a third company entered the market with a 20% share in 1979, Litton was attributed a 63% share for 1979.

To arrive at his calculation of the overall market, and the market shares of Litton and American Bearing, the economist relied on the testimony of Albert Hudson, an expert witness testifying on behalf of American Bearing, that the ratio of the cost of bearings in electrostatic precipitators to the total flange to flange cost of the precipitators is 3% (.003) and that this same ratio exists between the cost of bearings used in baghouses and the total cost of baghouses. The economist used the .3% figure in conjunction with figures supplied by, and testified to at trial, by Robert McIlvaine, another expert witness who testified on behalf of American Bearing. The figures supplied by Mr. McIlvaine represented the total cost for each year beginning in 1976 of all sales of hot slide precipitators and baghouses, that is, precipitators and baghouses operating at temperatures in excess of 250°F. By multiplying Mr. McIlvaine's annual figures for baghouse and precipitator sales by Mr. Hudson's .3% figures, the economist arrived at what he considered to be the size of the relevant market in dollars for thermal bearing sales for each year, beginning in 1976. By comparing American Bearing's total sales of thermal bearings, determined from its invoices, for each year, with the figure purportedly representing total sales of thermal bearings for each year, the economist arrived at American Bearing's share of the relevant market and attributed the remaining share to Litton.

Litton asserts that the economist's method of calculating the overall market was far too speculative in that the testimony of Mr. McIlvaine showed that his figures included precipitators and baghouses which used bearings outside the market defined by the economist. The Court agrees.

The economist testified that in his opinion: there existed a separate definable market for "thermal" bearings which he defined as bearings which operate at 400°F, 3000 pounds p.s.i. with a 3% coefficient of friction; while other types of bearings were occasionally used in baghouses and precipitators, there was a separate market for thermal bearings used in baghouses and precipitators, and; that other bearings were not relevant to the market because they did not have the performance characteristics of thermal bearings. However, in calculating the size of the relevant market, he employed figures which included bearings outside the market which he had defined. Specifically, he relied upon the figures supplied by Mr. McIlvaine showing the dollar value of precipitator and baghouse sales. Mr. McIlvaine had testified that his figures included *all* precipitators and baghouses operating at temperature in excess of 250°F and thus included "hot side" precipitators operating at temperatures of about 700°F and some experimental precipitators which operate at about 1000°F. Since the record in this case shows that the teflon slide bearings at issue in this litigation, and around which the economist based his relevant market, sublimate at approximately 620°F, it is clear that these bearings could not have been used in all the precipitators included in Mr. McIlvaine's figures. In addition, the evidence showed that although thermal slide bearings were used in precipitators operating between 250° to 350°F, other types of bearings were also occasionally used. There is nothing, however, in the record to establish what percentage of the baghouses and precipitators included in Mr. McIlvaine's figures contained bearings other than "thermal" bearings.

Since Mr. McIlvaine's figures clearly were not tailored to fit the market which the economist was attempting to quantify, the use of Mr. McIlvaine's figures by the economist could only result in speculation as to the size of the market and the parties' shares of that relevant market. The economist made no effort to adjust his figures to account for the baghouses and precipitators outside the market he had defined, nor was there any reliable evidence in the record upon which he could rely to determine the actual extent of the relevant market. The economist did testify that *Mr. Hudson* had told him that hot-side precipitators would only account for 5% of Mr. McIlvaine's figures.[2] Neither Mr. Hudson nor Mr. McIlvaine had so testified when they were on the stand. This statement was hearsay and is clearly not the type of statement upon which an expert economist should reasonably rely. Furthermore, when asked by the Court whether he had subtracted this 5% figure, he admitted that he performed no arithmetic in his calculations to reduce Mr. McIlvaine's figure or his own figure to reflect the 5% of "hot side" precipitators outside the market.

In conclusion, based on the fact that the economist, in quantifying the size of a narrow and carefully defined thermal bearing market, relied on figures which were shown to include baghouses and precipitators which used bearings outside his defined market and the fact that there was no reliable or admissible evidence upon which the jury or the economist could determine the extent to which bearings outside this market should have been deducted, the Court has determined that the economists' testimony

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2. The 5% figure would still not account for occasional use of other bearings in "cool side" precipitators.

in this respect was misleading and speculative[3] and should have been excluded pursuant to F.R.E. 403. Furthermore, his testimony based upon the alleged out of court statement of Mr. Hudson that only 5% of Mr. McIlvaine's figures included "hot side" precipitators was clearly not admissible under Rule 703 in that it is not the type of evidence that expert economists reasonably rely upon. The 5% figure attributed to Mr. Hudson was objectionable hearsay. Mr. Hudson testified prior to the economist and made no mention of the 5% figure in his testimony and the defendant had no opportunity to cross-examine him concerning it. Rule 703 was never intended to permit an expert in any field to base an opinion upon such basic data which another expert had told him under such circumstances. As Judge Becker pointed out in *Zenith Radio, supra,* one of the factors to be considered by a court in determining the reasonableness of an expert's reliance under Rule 703 is "the extent to which the materials on which the expert relied are within his immediate sphere of expertise." Professor Bowman is well qualified as an economist, however he admitted that he had no expertise concerning the use of bearings in baghouses and precipitators.

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3. In *Kennecott Copper Corporation v. Curtiss-Wright Corporation,* 584 F.2d 1195, 1204, n.10 (2d Cir. 1978), the Court in commenting on a similar type of method used by the plaintiff's expert in calculating the size of the relevant market, stated:

> According to the transcript, the witness described the foregoing as the "mythology" used by Carborundum in calculating the marketplace. This was probably an error in transportation in that the word actually used was "methodology." However, the former term seems to be more descriptive. In any event, these calculations were a completely inadequate foundation upon which to base a judgment nullifying a $77 million investment.

C. The Testimony of the Economist Relating to Damages

The economist prepared and testified with respect to a chart, Exhibit P29, which purported to show in three columns; his calculations of the profits American Bearing would have earned from sales in the thermal bearing market from 1976 through 1983 absent Litton's alleged unlawful conduct; his estimate of American Bearing's actual profits through 1980 and its projected profits through 1983 in thermal bearing market, the latter figure assuming the absence of Litton's alleged unlawful conduct, and; the profits American Bearing lost from 1976 through 1983 as a result of Litton's allegedly unlawful activities.

To obtain the first set of figures showing the profits American Bearing would have earned from 1976 to 1983 in the absence of Litton's alleged unlawful conduct, the economist began by multiplying the total dollar amount of sales of thermal bearings for each year (the figure he had estimated by multiplying Mr. McIlvaine's figure for the sale of "hot" precipitators and baghouses by Mr. Hudson's .3% figure) by his estimate of the percentage of the market American Bearing would have controlled each year (12.5% in 1976; 37% in 1977; 50% for 1978) in the absence of the alleged unlawful conduct. The product of these two figures purported to be the revenues American Bearing would have obtained in the absence of Litton's alleged unlawful conduct. The economist then deducted his estimate of American Bearing's cost of producing the bearings and arrived at his figure for the profits American Bearing would have achieved in the absence of Litton's alleged unlawful conduct.

The economist determined American Bearing's actual profits for the years 1976 through 1980 by adding up American Bearing's invoices for the sales of thermal bearings and deducting from

that total his cost estimates for producing the bearings. To calculate American Bearing's lost profits he deducted American Bearing's actual profits from his estimate of the American Bearing's profits absent Litton's allegedly unlawful conduct.

The Court has determined that the economist's testimony with respect to the amount of lost profits should have been stricken for several reasons. First among these is the fact that the initial figure in his calculations (the estimated profits in the absence of Litton's alleged unlawful conduct) was based upon his opinion as to the total dollar amount of sales of thermal bearings for each year, an opinion which this Court has heretofore determined was too speculative and misleading to have been admitted at trial. The use of this figure by the economist as a basis upon which to determine American Bearing's lost profits rendered the result speculative and misleading.

In addition, the economist's testimony and the accompanying exhibits relating to the amount of lost profits are also inadmissible in that they were based on certain unsupported assumptions and, therefore, were unreliably based under F.R.D. 703, and were speculative and misleading in contravention of Rule F.R.E. 403. For example, his projection of American Bearing's fair competition profits for the years 1976-78 was based upon his estimate that American Bearing would have achieved market shares of 12½% in 1976, 37% in 1977 and 50% in 1978. He estimated market shares were based on his oft repeated assumption that American Bearing was offering a better product, with better service, at a lower price. The only support in the record for any of these assumptions is the testimony of Mr. Roman, President of American Bearing, that American Bearing generally sold its bearing at a cost 50% lower than that charged by Litton and could deliver faster. There is no evidence in the record that any comparative

tests were performed on the two bearings to determine relative superiority in terms of performance or durability. Furthermore, insofar as the economist assumed that these conditions, in particular that of lower price, would continue to exist as American Bearing's market share increased to 50% and Litton's share declined, his projections fail to account for any lawful competition and rational economic reactions on the part of Litton. As the United States District Court for the Middle District of Pennsylvania recently stated in addressing post-trial motions which attacked the sufficiency of proof of plaintiff's economic damage model,

> Perhaps the most blatant defect in plaintiff's damage model for lost profits is its failure to account for any lawful competition. Surely plaintiff cannot have expected the defendants to sit idly by while it proceeded to grasp 25% of the road construction market and maintain its roughly 12% of the blacktop production market, when each market began to dry up. As defendants point out, they were well integrated, established firms in the area. To postulate damages on the assumption that they would not individually react by reducing their prices and therefore require plaintiff to further reduce its price, thus reducing its net profit, is absurd. Nor did plaintiff present any evidence from which the jury, could, without speculation, determine what the affect of lawful competition would have been and reduce the damages accordingly.

R.S.E., Inc. v. Pennsy Supply, Inc., 525 F. Supp. 954, 966 (W.D. Pa. 1981).

Likewise, in *Murphy Tugboat v. Crowley,* 658 F.2d 1256 (9th Cir. 1981), the Ninth Circuit, in commenting on the expert witness' testimony as to a plaintiff's projected share of the market absent the defendant's unlawful conduct, stated

> A reasonable jury could not, however, indulge in the assumption that a competitor would follow a course of behavior other than that which it believed would maximize its profits. . . . In a hypothetical economic construction such as the one underlying Murphy's theory on lost profits, economic rationality must be assumed for all competitors, absent the strongest evidence of chronic irrationality. Otherwise it will be impossible to keep speculation in check.

658 F.2d at 1262. Similarly, the Third Circuit, in *Coleman Motor Co. v. Chrysler Corp.,* 525 F.2d 1338, 1353 (1975), granted a new trial in a Sherman Act antitrust case based in part on the ground that the expert, in calculating plaintiff's damages, failed to take into account the effect of sales which would be lost as a result of lawful competition.

In this case there was no reason for the economist to assume that if Litton had begun to lose a substantial portion of its market to American Bearing that it would not or could not have reduced its prices in order to remain competitive. The economist, in making his projection as to market shares and profits, did not take into consideration the effect a change in price by Litton would have had on market shares and American Bearing profits. His estimates, therefore, were speculative and misleading as to the damages attributable to Litton's unlawful activities. Thus, the economist's reliance on the unsupported assumptions discussed above rendered his opinion excludable under both Rules 703 and 403.

The economist also testified that in order to determine American Bearing's cost of manufacturing its bearings, he went to American Bearing's plant, reviewed the way the bearings were made, looked at the various materials required to manufacture the bearings, examined invoices to determine the costs of the various materials, looked at the accounts of the firm to determine the overhead percentage attributable to the manufacture of the thermal bearings and relied upon a time study prepared by Mr. Furchak, the secretary-treasurer and a stockholder and co-founder of American Bearing. Although Mr. Furchak testified at trial, he did not testify as to the preparation of the time study. On cross-examination, the economist testified that he did not know whether the study had been prepared by Mr. Furchak solely for the purpose of this litigation. Since Mr. Furchak had not testified in court concerning the study and clearly had an interest in the litigation and since the economist did not know the circumstances under which the study was made, it lacked the "necessary safeguards of accuracy and reliability—the circumstantial guarantees of trustworthiness" set forth in *Pittsburgh Press Club v. United States,* 579 F.2d 751 (3d Cir. 1978). Furthermore, as heretofore pointed out, since under F.R.E. 703 the court is to determine the reasonableness of an expert's reliance on a study upon which he bases his opinion, the court concluded that because of the untrustworthiness of the time study the opinion of the economist based thereon was inadmissible.

In making all of the above determinations regarding the admissibility of the expert's testimony as to damages we have heeded the admonition of the Supreme Court to

> observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a

> partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injury plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24, 89 S. Ct. 1562, 1576-77, 23 L. Ed. 2d 129 (1969), *quoting Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946). However, the nature of the economist's testimony was not such as would allow the jury to determine the plaintiff's damages by a "just and reasonable inference" from the evidence presented. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d at 1353. Instead the economist's testimony could only lead to a damage award based on speculation or guesswork. *See Murphy Tugboat Co. v. Crowley*, 658 F.2d at 1261.

D. Summary

Having determined, for the reasons heretofore stated, that the Court should have excluded certain critical portions of the economist's testimony, there is no question that there has been a miscarriage of justice insofar as the testimony given by the economist constituted a substantial and integral part of American Bearing's proof of its §2 Sherman Act claims. The Court will,

therefore, grant Litton's motion for a new trial limited solely to American Bearing's §2 Sherman Act claims, there being no reason to disturb the jury's verdict in favor of Litton on American Bearing's claim of product defamation.

COURT OF APPEALS JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1248

THE AMERICAN BEARING COMPANY, INC.

vs.

LITTON INDUSTRIES, INC. AND LITTON INDUSTRIAL PRODUCTS, INC.

American Bearing Company, Appellant

(D.C. Civil No. 78-2003)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, BECKER and VAN DUSEN, *Circuit Judges*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel November 14, 1983,

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 10, 1983, be, and the same is hereby affirmed. Costs taxed against Appellant.

Court of Appeals Judgment

ATTEST:

s/ M. Elizabeth Ferguson
Chief Deputy Clerk

March 16, 1984

COURT OF APPEALS ORDER

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-1248

THE AMERICAN BEARING COMPANY, INC.,

Appellant

v.

LITTON INDUSTRIES, INC., et al.

(C.A. No. 78-2003)

SUR PETITION FOR PANEL REHEARING OR REHEARING IN BANC

Present: ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and VAN DUSEN*, *Circuit Judges.*

The petition for panel rehearing or rehearing in banc filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the

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* As to panel rehearing only.

Court of Appeals Order

Court in banc, the petition for panel rehearing or rehearing in banc is denied.

By the Court

s/ Arlin M. Adams

DATED: April 16, 1984

INTERROGATORIES TO THE JURY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 78-2003

THE AMERICAN BEARING COMPANY, INC.

v.

LITTON INDUSTRIES, INC. and LITTON INDUSTRIAL PRODUCTS, INC.

We, the jury in the above captioned case, unanimously find:

1. Do you find that the plaintiff has proved by a preponderance of the evidence: that the defendant published a defamatory statement concerning plaintiff's bearing; that the publication was false; that the publication was done with malice; and that the publication caused special damages to the plaintiff?

YES NO X

Instructions: Proceed to question No. 2.

2A Do you find that the plaintiff has proved by a preponderance of the evidence that during a period of time from 1976 until June 15, 1978, defendant had monopoly power in the relevant market?

YES X NO

Interrogatories to the Jury

Instructions: If your answer to question No. 2A is YES, then proceed to question No. 2B. If your answer to question No. 2A is NO, proceed to question No. 3A.

2B Do you find that the plaintiff has proved by a preponderance of the evidence that during a period of time from 1976 until June 15, 1978, defendant had the intent to exercise its monopoly power to exclude competitors from the relevant market?

YES X NO

Instructions: If your answer to question No. 2B is YES, then proceed to question No. 2C. If your answer to question No. 2B is NO, proceed to question No. 3A.

2C Do you find that the plaintiff has proved by a preponderance of the evidence that it suffered damage to its business proximately caused by defendant's exercise of its monopoly power with the intent to exclude competitors from the relevant market?

YES X NO

Instructions: Proceed to question No. 3A

3A Do you find that the plaintiff has proved by a preponderance of the evidence that during a period of time from 1976 until June 15, 1978, the defendant intended to achieve monopoly power to exclude competitors from the relevant market?

Interrogatories to the Jury

YES X NO

Instructions: If your answer to question No. 3A is YES, then proceed to question No. 3B. If your answer to question No. 3A is NO, proceed to question No. 4.

3B Do you find that the plaintiff has proved by a preponderance of the evidence that the defendant did some act or acts during a period of time from 1976 until June 15, 1978, in furtherance of its intent to achieve monopoly power to exclude competitors from the relevant market and that there was a dangerous probability that the defendant would sooner or later achieve monopoly power to exclude competitors from the relevant market?

YES X NO

Instructions: If your answer to question No. 3B is YES, then proceed to question No. 3C. If your answer to question No. 3B is NO, proceed to question No. 4.

3C Do you find that the plaintiff has proved by a preponderance of the evidence that it suffered damage to its business proximately caused by defendant's attempt to achieve monopoly power to exclude competitors from the relevant market?

YES X NO

Instructions: If your answer to question No. 1, question No. 2C *or* question No. 3C was YES, then proceed to question No. 4.

Interrogatories to the Jury

If your answers to question No. 1, question No. 2C *and* question No. 3C were NO, then proceed no further.

4. In what amount do you assess damages?

$958,691.00

Instructions: If your answer to question No. 1 was YES, then proceed to question No. 5.

5. In what amount do you assess punitive damages?

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s/ Thomas J. Flood
(Signature of Foreperson)

Dated: June 9, 1981.